Supreme Court, U.S.
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No. 94–

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.,

Petitioner,

v.

ALVORD-POLK, INC., *et al,*

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Third Circuit's decision in this case presents these fundamental issues under Section 1 of the Sherman Act concerning the standards for proving antitrust conspiracy based on circumstantial evidence:

1. Whether evidence from which a jury could infer that a manufacturer's publicly stated reason for a vertical restraint was pretextual is sufficient to permit a jury also to infer that the manufacturer conspired with its complaining dealers to adopt the restraint?

The Third Circuit's resolution of this issue is in accord with decisions of the Ninth and Eleventh Circuits and in direct conflict with decisions of the First, Second, Fourth, Seventh and Eighth Circuits.

2. Whether the decision in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), should be extended to impose antitrust conspiracy liability upon a not-for-profit trade association which is not engaged in standard-setting activities, and which has adopted antitrust policies and other safeguards against unauthorized actions of its members, as a result of the unauthorized actions of one or more of its alleged apparent agents.

The Third Circuit's resolution of this issue improperly extends the decision in *Hydrolevel,* misapplies

the doctrine of apparent authority, and eliminates the fundamental requirement that an agreement must exist between two or more actors in order to impose liability under Section 1 of the Sherman Act.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the respondents include: American Blind Factory, Inc.; Delta Paint and Wallpaper Supply Co., Inc.; Fairman Wallpaper and Paint Company; Frank R. Yocum t/a Frank R. Yocum & Sons Wallpaper Co.; Harry's Wallpaper, Inc.; Lancaster Carpet Mart, Inc.; Marvin Kolsky t/a Headquarters Windows & Walls; Silver Wallpaper & Paint Co., Inc.; Yankee Wallcoverings, Inc.; and F. Schumacher & Co.

Pursuant to Supreme Court Rule 29.1, petitioner declares that it has no parent companies and no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

The National Decorating Products Association, Inc. ("NDPA"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on panel rehearing (App., *infra*, A1-A62) is reported at 37 F.3d 996. The initial panel opinion of the court of appeals (App., *infra*, A66-A132) is reported at 1993-2 Trade Cas. (CCH) ¶ 70322. The opinion of the district court (App., *infra*, A133-A187) is reported at 1992-1 Trade Cas. (CCH) ¶ 69837.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1994. App., *infra*, A63-A65. The timely petition for rehearing was denied on November 15, 1994. *Id.* at A188-A189. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ....

INTRODUCTION AND STATEMENT OF THE CASE

This case involves an important and frequently recurring question under Section 1 of the Sherman Act: the nature of circumstantial proof that is sufficient to support an inference of antitrust conspiracy between a manufacturer and its dealers. In the years that have elapsed since this Court's decision in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), the courts of appeals have divided in their application of Section 1 to claims of manufacturer/dealer conspiracies. The split of authority centers on precisely the issue presented in this case, *viz.*, whether the existence of a conspiracy may be inferred from circumstantial evidence that the stated reason for a manufacturer's distribution policy is allegedly pretextual. Eight courts of appeals have addressed this question, reaching widely disparate results. Review by this Court is therefore needed to restore nationwide uniformity on a question of great practical consequence to all manufacturers and their dealers.

This case provides an ideal vehicle for this Court's consideration because it is undisputed that respondents[1] are "free-riders" and that the manufacturer's distribution policy with respect to them was fully consistent with lawful, unilateral activity. Accordingly, the decision below turns

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1. Only the group of dealers who were plaintiffs below will be referred to as "respondents." For purposes of clarity, the term "respondents" will not include F. Schumacher & Co. ("Schumacher"), a defendant below, and nominally a respondent in this Court. Schumacher has also petitioned this Court for a writ of certiorari, in Case No. 94-1278.

entirely on the legal question whether evidence of pretext alone permits an inference of conspiracy.

This case also involves an important question under Section 1 of the Sherman Act as applied to trade associations: the nature of circumstantial proof that is sufficient to bind a not-for-profit trade association as a result of the individual actions of its alleged apparent agents. Since this Court's decision in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), there has been confusion about the extent to which its holding and rationale should be applied to trade associations like NDPA which do not set standards or promulgate codes, and there has been no clear articulation of the effect to be given to the adoption of safeguards against unauthorized conduct that were announced as a goal of the Court in *Hydrolevel*. By stating that the unilateral actions of a sole actor can subject a trade association to antitrust conspiracy liability, the opinion below eviscerates the requirement that an agreement or concerted action between two or more actors must be established in a Section 1 case. The decision below cannot be squared with *Hydrolevel*, realizes the worst fears of those dissenting in *Hydrolevel*, and independently warrants this Court's plenary review.

Factual background. NDPA is a not-for-profit New Jersey corporation and trade association whose membership is composed primarily of independent decorating products retailers. App., *infra*, A12. NDPA is not a standard setting organization. It functions instead as an educational association dispensing information to its members, and it publishes magazines and holds trade

shows in furtherance of that function. *Id.* The business and policy of NDPA is established and directed solely through the actions of its 18-member board of directors, each of whom is an independent dealer who "volunteers" his or her time to serve the trade association as a director. *Id.* The constitution and by-laws of NDPA provide that no individual officer, director or employee may act or speak on behalf of NDPA on matters of business or policy. CA App. 2248; 2263; 1982-2043.

Traditionally, wallcoverings have been distributed to the consumer through retail operators who display numerous wallcovering catalogues which are purchased from manufacturers or distributors. The costs for training, sales personnel, catalogues and display space are items of capital investment for which the retailer seeks a return. Schumacher is in the business of designing and selling home furnishing products, including wallcoverings sold through its FSC division. Schumacher has always encouraged its dealers to make substantial investments in sample books, showrooms and staff because market research established that this is the most effective way to promote its products. *Id.*, at A11, A37; CA App. 183, 1341-43, 1520. Retailers willingly made the necessary investments to provide these services because doing so increased their wallcoverings sales. CA App. 517, 520, 526, 1355, 1360.

In the past ten years, changes in the marketplace have undermined the conventional retailer's ability to obtain a return on its investment in point-of-sale and marketing services. A new breed of retailer -- the "800 number" dealer -- uses toll-free numbers to accept orders from consumers nationwide who have "availed themselves

of the sample books, displays and assistance offered by conventional retailers." App., *infra,* A11; CA App. 1192-93. Advertising in magazines, such dealers encourage consumers to "shop in your neighborhood, write down pattern number/book, then call." CA App. 2348. Respondents are among those 800 number dealers, who capture sales they have not generated, feeding off the investments of full-service dealers. App., *infra,* A11, A37; CA App. 1192-94, 1279-81, 1288-94, 1367-68, 1372-74, 1594. In short, as the court of appeals stated, it is undisputed that respondents are "free-riders." App., *infra,* A11 n.4, A37.

With the emergence of the 800 number dealer, traditional wallcovering retailers began to voice complaints and to refer to 800 number operators as "pirates." *Id.*, at A12. The Federal Trade Commission ("FTC") filed a complaint against NDPA and others in 1985 alleging a violation of the Federal Trade Commission Act. *Id.*, at A13. In June 1986, NDPA settled that action, denied any violation of law, and entered into a consent decree (the "Order") regarding conduct on certain issues related to those complaints *Id.*, at A13-14.

NDPA thereafter took repeated actions to notify its members and the industry of the terms and conditions of the Order and of NDPA's antitrust policy. CA App. 1974-1975. The Order was mailed to each of NDPA's members, published in NDPA's monthly magazine, and provided to each new member of NDPA thereafter. CA App. 1974. Each NDPA member was urged by NDPA to read the Order and to not engage in anticompetitive activity. CA App. 2051.

NDPA also adopted speaker guidelines and meeting guidelines which required any speaker to state clearly that the views expressed therein were those of the speaker and not those of NDPA, and prohibiting discussion of collective activity by NDPA's members. CA App. 2066-72; 2100-01. An antitrust policy was adopted by NDPA in 1986, and revised in 1989. CA App. 2063-64; 2098-99. NDPA's antitrust policy has been provided to its officers, directors, employees and members continuously since June, 1986. CA App. 2060; 2075-76; 2094.

Following entry of the Order, the discussion continued within the industry about the 800-number operations and their effect on the industry. Respondents forwarded a stream of complaints about NDPA to the FTC beginning in 1988, alleging that NDPA had violated the Order. The FTC, however, responded to these inquiries with the assurance that, in its view, NDPA was in compliance with the Order. App., *infra*, A20-21.

Meanwhile, Schumacher accurately perceived that the emergence of the 800 number free-riders posed a serious threat to its distribution system. CA App. 1238-40, 1340-47. Conventional retailers -- those who pay for the facilities, sample books and salespersons necessary to educate consumers about Schumacher's products and who provide post-sale customer service - became increasingly unwilling to invest in point-of-sale consumer information and assistance. To maintain its competitive position by ensuring that retailers had sufficient incentive to invest in consumer services, in 1988 Schumacher reacted to the free-riders by announcing a surcharge on drop shipments

of wallcoverings.[2] App., *infra*, A17; CA App. 298-99, 1207-08, 1238-40, 1306, 1340-43.

The surcharge policy proved unsuccessful in combating the free-rider problem. CA App. 1512-15, 1307-08. Conventional retailers continued to lose substantial sales to 800 number dealers and to reduce their investments in point-of-sale service. App., *infra*, A18; CA App. 1512-15, 1307-08. Schumacher's sales suffered. CA App. 307. In response, Schumacher unilaterally implemented a revised marketing and advertising policy in 1990 that, among other things, prohibited dealers from selling outside their trading areas ("local trading area policy"). App., *infra*, A19; CA App. 1201-04, 1215, 1218-19, 1222-23, 1238-40, 1249-50, 1340-43, 1520-22, 1550-52. Schumacher believed that, without action against the 800 number dealers, it "would continue to have resistance to purchasing sample books..." App., *infra*, A19; CA App. 691. Schumacher's local trading area policy had the desired impact: it reduced free-riding and increased Schumacher's sales. CA App. 319-21, 982-84, 1017-19, 1021, 1023-25, 1307, 1371-73, 1662-65, 1770-71, 1831-32, 1836-37.

Proceedings in the district court. In June 1990 respondents, a group of ten 800 number dealers filed suit in the United States District Court for the Eastern District

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2. Drop shipments are shipments arranged by 800 number dealers directly from the manufacturer to the purchaser's home. App., *infra*, A17.

of Pennsylvania.[3] Count I of the Amended Complaint alleged that NDPA was a participant in a horizontal conspiracy with individual retail wallcovering dealers calculated to eliminate competition posed by 800-number operators in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1988). CA App. 105-107. Count II of the amended complaint alleged that Schumacher, responding to pressure exerted by retail wallcovering dealers acting through NDPA, conspired with NDPA to drive 800 number dealers from the market. CA App. 108. After extensive discovery, respondents were bereft of any direct evidence of these alleged conspiracies, and relied solely on circumstantial evidence to establish the concerted action required by Section 1.

At the conclusion of discovery, the district court granted NDPA's motion for summary judgment on all claims that were directed against NDPA. The district court found no direct evidence of conspiracy, and insufficient circumstantial evidence, with respect to the group boycott claim asserted in Count I. App., *infra*, A148.

The district court also granted the motions of NDPA and Schumacher for summary judgment on Count II (App., *infra,* A153), relying on the standard this Court enunciated in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), namely, that conduct which is as consistent with permissible activity as with an

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3. District court jurisdiction rested on 28 U.S.C. § 1331. The complaint, and the amended complaint, also alleged a variety of federal and state law claims against the defendants. Those other claims are not at issue in this petition.

illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. App., *infra*, A149. The district court adhered to this Court's holding in *Monsanto*, 465 U.S. at 763-64, and precluded inferences that "could deter or penalize perfectly legitimate conduct." App., *infra*, A152. On the record before it, the district court held that respondents had not presented evidence that "tends to exclude that [Schumacher] was acting independently when it developed its marketing and drop-shipment policies." *Id.* at A153.

Proceedings in the court of appeals. Initially, a divided panel of the Third Circuit affirmed the district court's grant of summary judgment.[4] App., *infra*, A66-A132. The majority opinion, authored by Judge Lewis, held that the record in this case would require "an exercise in conjecture" to find an agreement among NDPA's members to boycott manufacturers, and that the record could not support an inference of a vertical conspiracy between Schumacher and its dealers. *Id.*, at A95-97. The court analyzed the evidence regarding alleged urgings by NDPA's officers to boycott manufacturers, and concluded that "it would be unreasonable for a jury to infer that these officials were speaking as representatives of NDPA. Moreover...the statements constituted nothing more than further complaints about 800-number dealers...." *Id.*, at A96.

In assessing Count II, the majority applied the rule of *Monsanto and Matsushita*, that "evidence of conduct

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4. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

which is 'as consistent with permissible competition as with illegal conspiracy' without more, does not support an inference of conspiracy ... because mistaken inferences in such a context 'are especially costly[;] they chill the very conduct the antitrust laws are designed to protect.'" *Id.*, at A74. (citations omitted). The court also observed that respondents' "allegations flow directly from evidence of conventional retailers complaining to [Schumacher] and other manufacturers about [respondents'] 'free-riding.' This type of evidence is as consistent with procompetitive activity as with allegedly illegal activity." *Id.* at A97.

The court also addressed respondents' contention that an inference of concerted action with conventional dealers could be drawn if Schumacher had advanced pretextual reasons for its actions. *Id.* at A102-A106. After reviewing the alleged "pretext," the majority held that respondents' "have simply failed to present evidence tending to exclude the possibility of independent action, as they must to survive summary judgment under *Monsanto*." *Id.* at A106.

Respondents filed a petition for rehearing that challenged, *inter alia*, the affirmance of summary judgment on Counts I and II. The panel granted rehearing and, nearly one year later, issued another split decision. App., *infra*, A1-A63. In a 180-degree turnabout, the new majority opinion, again written by Judge Lewis, reversed the district court's grant of summary judgment on Counts I and II.

Reviewing precisely the same evidence discussed in its initial opinion, the court recognized that it was deciding an issue--antitrust liability arising from the concerted

action of a group such as a trade association, as that liability may be established by the apparent authority of an agent to speak on behalf of and bind that association--that has not yet been fully explored in a trade restraint case. *Id.*, at A30. The court stated that "a principal will be liable for an antitrust violation if *an* agent acting with apparent authority violates the antitrust laws, as one did in *Hyrdolevel by conspiring with another person.*" *Id.*, at A31. (emphasis supplied) In contrast to its earlier opinion, the court held that a jury could find that NDPA's officers went beyond merely voicing complaints to manufacturers and actually coerced or attempted to coerce them into cooperating in eliminating 800-number dealers. *Id.*, at A40.

Reviewing Count II, the new opinion reiterated that undisputed evidence permitted a jury to find that Schumacher's actions "were entirely consistent with its previously held view of its own self-interest and do not tend to demonstrate that it acted in conjunction with anyone in implementing its policies." *Id.* at A37. Nonetheless, the court rejected its earlier holding based on reconsideration of respondents' contention that Schumacher asserted "pretextual reasons for its actions." *Id.* at A40. The standard for decision by the new majority was:

> If [petitioner] in fact advanced reasons for its actions which were pretextual, this would tend to support an inference that it acted as part of a conspiracy with conventional retailers.

Id. at A37. The court then turned to the two alleged examples of "pretext." First, respondents sought to draw an inference of conspiracy from "inconsistencies in and contrasts between [Schumacher's] internal and the public explanations of the drop shipment policy." *Id.* at A39. Comparing the press release announcing the surcharge with a preliminary draft of the announcement, the court concluded that "a jury might view [Schumacher's] apparent desire to use more genteel language when explaining its actions to the public as implying a sinister motive." *Id.*

Second, respondents contended that "at one time [Schumacher] also stated that the surcharge was intended in part to recoup increased costs associated with drop shipments" but did not "use mathematical calculations to arrive at its surcharge figure." *Id.* Although it acknowledged that this "does not indicate that [Schumacher] was not pursuing its self interests," the court held that "it is not an implausible conclusion that [Schumacher] may have imposed the surcharge without first undertaking mathematical calculations because it had agreed with others to impose the surcharge whether it made economic sense or not." *Id.* at A40 .

In the court's view, the record contained "some evidence from which a rational jury could infer that [Schumacher] advanced pretextual reasons for its policies" and, therefore, a jury might "in turn infer that [Schumacher] had acted in concert with NDPA in deciding to implement policies designed to injure 800-number dealers . . . ." *Id.*

Judge Stapleton dissented. He explained that liability under Section 1 does not turn on whether a

defendant had "'a sinister motive,'" but on whether it acted in combination with others. App., *infra*, A56. He also concluded that where the circumstantial evidence of "pretext" was equally compatible with both unilateral and concerted conduct, the majority decision could not be reconciled with the holding in *Monsanto*. *Id.* at A59.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with decisions of five other courts of appeals on the important, recurring question whether ambiguous circumstantial evidence of a manufacturer's allegedly "pretextual" justification for a distribution policy is sufficient, standing alone, to support an inference of concerted action under Section 1 of the Sherman Act. In *Monsanto*, 465 U.S. at 763-64, this Court recognized the importance of free, open communication between a manufacturer and its dealers and, therefore, held that evidence of conduct that is as consistent with permissible competition as it is with illegal conspiracy will not, without more, support an inference of conspiracy under Section 1. Antitrust plaintiffs must present evidence that tends to exclude the possibility that the defendant was acting independently. *Monsanto*, 465 U.S. at 764; *Matsushita*, 475 U.S. at 588.

The decision below turned entirely on the legal issue whether evidence of "pretext," without more, satisfies the requirements of *Monsanto* and *Matsushita*. This is a question on which the courts of appeals are deeply divided. What could better illustrate the uncertainty that exists in the lower courts than the experience of the Third Circuit panel that looked twice at

the same record and reached diametrically opposed results?

Guidance from this Court is plainly needed to ensure nationwide uniformity on this important issue of antitrust law, just as it was when certiorari was granted in *Monsanto* to resolve a similar conflict. Moreover, the absence of factual disputes on the critical issues in this case offers an ideal record for this Court's consideration.

A. This Court Must Resolve The Conflict Among The Courts Of Appeals On The Question Whether A Conspiracy May Be Inferred From Circumstantial Evidence That The Stated Reason For a Manufacturer's Distrubtion Policy Is Allegedly Pretextual.

1. Circuit Conflict. In the decade since this Court decided *Monsanto*, the lower courts have had numerous opportunities to delineate types of circumstantial evidence that tend to exclude independent action and thereby permit a Section 1 conspiracy to be inferred. One type of circumstantial evidence has been especially vexing to the federal appellate courts: evidence of allegedly pretextual reasons for a distribution policy. The Third Circuit's holding that evidence of alleged pretext was sufficient to exclude the possibility of independent action conflicts with post-*Monsanto* decisions by the Second, Fourth, and Eighth Circuits. These courts have all held that evidence of pretext alone will not support an inference of antitrust conspiracy. *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005 (2d Cir. 1989); *Garment Dist. Inc. v. Belk Store Services, Inc.*, 799 F.2d 905 (4th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988);

Lovett v. General Motors Corp., 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994).[5]

Squarely conflicting with these decisions, the Ninth and Eleventh Circuits join the Third Circuit in holding that evidence of pretext is sufficient. *Boczar v. Manatee Hosps. & Health Sys.*, 993 F.2d 1514 (11th Cir. 1993); *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990);De *Long Equipment Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990); *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986).[6] *See also, De Long Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1196 (11th Cir.), *cert. denied*, 114 S. Ct. 604 (1993).

This conflict is rooted in the most fundamental aspect of Section 1, the proscription of concerted -- but not unilateral -- action. *Monsanto*, 465 U.S. at 761; *Matsushita*, 475 U.S. at 588; *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). In

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5. Prior to *Monsanto*, the First and Seventh Circuits held that evidence of pretext alone will not support an inference of antitrust conspiracy. *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853 (lst Cir. 1982); *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068 (7th Cir. 1978).

6. The antitrust claim in *Dimidowich* was brought under a provision of California's Cartwright Act that is patterned after § 1 of the Sherman Act. 803 F.2d at 1476. In assessing evidence of conspiracy, the Ninth Circuit applied the federal law standard of *Monsanto* and *Matsushita* requiring evidence which "tends to exclude the possibility that the alleged conspirators acted independently." *Id.* at 1479. Applying the same standard applicable here, the Ninth Circuit held circumstantial evidence of pretext could permit an inference of conspiracy. *Id.* at 1480.

contrast to the decision below, the more discerning decisions of other courts of appeals recognize that evidence of a pretextual reason for defendant's actions does not tend to exclude the possibility of independent action. As the Second Circuit has explained, the fact that a defendant may have had other, unstated, reasons for terminating a distributor or refusing to deal with a particular customer, "makes it neither more nor less probable that [the defendant] acted in concert with others rather than unilaterally" and does not, by itself, justify the inference that the conduct was the result of a conspiracy. *H.L. Moore Drug Exchange v. Eli Lilly Co.*, 662 F.2d 935, 943 (2d Cir. 1981), *cert. denied* 495 U.S. 880 (1982); *Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41, 47 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982) ("the most a jury could permissibly infer from such evidence (evidence of pretext) is that [defendant] had some reason other than [those it offered] for its actions."); *H.L. Hayden Co.*, 879 F.2d at 1016.[7]

The strong parallel between the evidence of pretext in this case and in a recent decision by the Eighth Circuit serves to bring the conflict into sharp focus. *In Lovett v. General Motors Corp.*, 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994), a discount automobile dealer alleged that General Motors conspired with full-service dealers to reduce plaintiff's allotment of Buicks. Although full service dealers had complained about plaintiff's free-riding on their investment in showrooms and point-of-sale services, GM told the plaintiff that the

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7. In his dissent below, Judge Stapleton emphasized the same flaw in the majority decision. App., *infra*, A59.

reason for the reduction in cars was a shortage of supply. The Eighth Circuit held that defendant was entitled to judgment as a matter of law because this evidence did not tend to exclude the possibility of independent action, as required by *Monsanto*. Even if GM was less than candid in explaining the reasons for its actions, that would not permit an inference that it acted in concert or as part of a conspiracy. *Id.* at 580.

In short, the conflict is extremely pervasive and encompasses a majority of the courts of appeals. The conflict is also well-entrenched. The decision below is the latest in a string of cases in which the Third Circuit has held that circumstantial evidence of pretext will support an inference of antitrust conspiracy. *See Big Apple BMW Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993); *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir. 1986). This Court's review is needed to resolve this split of authority and to restore uniform nationwide application of federal antitrust laws on a keystone issue that affects all manufacturers and their dealers.

2. *The Decision Below Directly Contravenes Supreme Court Precedent.* Even if the conflict among the courts of appeals were less pervasive and entrenched, this Court's review would still be warranted. At a fundamental level, the decision below is at war with the statutory requirement of concerted action in Section 1 of the Sherman Act and is contrary to this Court's interpretation of the statute. *Monsanto* emphasized the centrality of the "basic distinction between concerted and independent action . . . . " 465 U.S. at 761. Because "[i]ndependent action is not proscribed," a manufacturer has a "right to

deal, or refuse to deal, with whomever it likes as long as it does so independently." *Id.*, (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) and *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960)).

Faithful adherence to this distinction is especially vital in the manufacturer/dealer context where "[t]he manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free-riders' do not interfere." *Monsanto*, 465 U.S. at 763 (citing *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 55 (1977)). Recognizing the importance of the free flow of information between manufacturer and dealer in learning about and responding to the competitive marketplace, *Monsanto* held that evidence of dealer complaints followed by manufacturer action is inherently ambiguous and cannot support an inference of conspiracy without "something more". *Monsanto*, 465 U.S. at 764. The majority of courts of appeals have correctly perceived that highly ambiguous circumstantial evidence of "pretext" cannot constitute "something more." Indeed, evidence of "pretext" is even less supportive of an inference of concerted action than is the evidence considered in *Monsanto;* dealer complaints necessarily involve some participation by both dealer and manufacturer, while "pretext" does not.

Against this statutory and jurisprudential landscape, it is clear that the decision below "'would both inhibit management's exercise of its independent business judgment and emasculate the terms of the statute.'" *Monsanto*, 465 U.S. at 764 (quoting *Edward J. Sweeney &*

Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111, n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)). The flaw in the evidentiary standard adopted by the Third Circuit is that it poses a "considerable danger" that the doctrines enunciated in *Monsanto, Sylvania* and *Colgate* "will be seriously eroded" by permitting an inference of an unlawful agreement from "highly ambiguous evidence." *Monsanto, 465* U.S. at 763. For precisely that reason, this Court held in *Monsanto* that the necessary "something more" must be "evidence that tends to exclude the possibility that the manufacturer ... [was] acting independently." *Id.* at 764. *See Matsushita*, 475 U.S. at 588. Departing from that principle, the Third Circuit held that respondents' case could proceed even where "the scenario which is the focus of Count II is as consistent with pro-competitive activity as allegedly illegal activity" and where "a jury could find that, because [Schumacher] had for years recognized the importance of selling service, its actions were entirely consistent with its previously held view of its own self-interest and do not tend to demonstrate that it acted in conjunction with anyone in implementing its policies." App., *infra*, A37, A40. Unless the decision below is reversed, the danger this Court envisioned - and sought to prevent - in *Monsanto* will be realized.

3. Further Attributes of this Case Favor Certiorari. This case provides an ideal context for this Court's review. First, the case is devoid of factual dispute on any dispositive issue. As the court of appeals recited, it is undisputed that respondents are free-riders, and that the challenged conduct is perfectly consistent with Schumacher's long-standing, unilateral encouragement of dealers to invest in point-of-sale service. App., *infra, A34*, A37.

Second, there is no doubt that the judgment below turns entirely on the legal standard employed by the Third Circuit. The majority held that the conduct challenged in Count II "is as consistent with procompetitive activity as with allegedly illegal activity." App., *infra*, A34.[8] It was solely the evidence from which a jury could infer "pretext" that led the Third Circuit to hold that a jury could also make the further inference that Schumacher "acted in concert" rather than independently. *Id.* at 40.

4. *Practical Consequences Favor Certiorari.* This Court's review is also warranted because the existing split in the circuits has disruptive economic and jurisprudential ramifications and will encourage forum shopping. Under the rule adopted by the Third, Ninth and Eleventh Circuits, an inference of conspiracy will arise whenever, in the course of announcing or implementing a vertical distribution policy, a company's public statements about the rationale for that policy arguably conflict with, depart from, or use "more genteel language" than preliminary versions that may have been drafted by employees with no policymaking or decisionmaking authority. If such highly ambiguous circumstantial evidence could be the fulcrum for antitrust liability, then, as this Court has recognized, manufacturers would be discouraged from considering and adopting creative policies designed to improve their distribution systems and competitive positions. In short, procompetitive conduct would be chilled.

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8. The dissenting judge agreed with the assessment of the evidence, making the panel unanimous. App., *infra*, A56-A62.

The problem is particularly acute for companies that distribute products nationwide and are now subject to a patchwork quilt of antitrust standards that vary from circuit to circuit. Unless this Court restores uniformity, commercial enterprises have a strong incentive to adhere to the most restrictive standard and to forgo procompetitive vertical distribution strategies that would benefit consumers.

Antitrust plaintiffs will now be encouraged to forum shop among the circuits and expose antitrust defendants to the burden and expense of a jury trial within one circuit when the same action would be dismissed (and perhaps not even filed) in another circuit. The Eighth Circuit recognized the great difficulty and expense which a defendant faces in this type of case when, in reversing a jury verdict in *Lovett*, it stated:

> We believe the jury's finding of a conspiracy in this case shows why cases arising under Section 1 of the Sherman Act and based on highly ambiguous evidence should not be submitted to a jury. As the Supreme Court has explained, it is "extremely difficult for the manufacturer to convince a jury that its motivation [in taking action against a price-cutting dealer] was to ensure adequate services, since price cutting and some measure of service cutting usually go hand in hand." *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 727-28 (1988).

Lovett, 998 F.2d at 581.

Had the instant case been brought against NDPA in the Eighth Circuit, where NDPA maintains its headquarters, Count II would have been dismissed. Such a situation reflects poorly on the goal of uniform administration of federal law among the circuits.

B. This Court Must Correct The Unwarranted Extension Of Its Decision In *Hydrolevel*, And Delineate The Proper Boundaries Of A Trade Association's Antitrust Conspiracy Liabilities Under The Apparent Authority Theory First Adopted In That Decision.

1. *The Hydrolevel Decision.* In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), this Court, for the first time, utilized the common law theory of apparent authority to extend antitrust conspiracy liability to a standard-setting trade association. The American Society of Mechanical Engineers ("ASME") was a trade association, comprised of over 90,000 members, which promulgated codes and standards for areas of engineering and industry. *Id.*, at 558. ASME delegated the interpretation of its influential Boiler and Pressure Vessel Code to a sub-committee responsible for responding to public inquiries about that code. *Id.*, at 561. James, an officer of a supplier of a boiler safety device which held a dominant market position, and Hardin, an officer of an industry insurer, were high-ranking volunteer members of this sub-committee. In response to the threat of a new safety device marketed by a new competitor, James and Hardin conspired together to cause the sub-committee to unwittingly issue an interpretation of the ASME code

which was favorable to James' employer and unfavorable to the new competitor. *Id.*, at 560-561. This interpretation, issued on ASME stationery, and otherwise regular on its face, was used by James' employer to discourage customers from buying the competitor's device because it failed to satisfy the ASME code. *Id.*, at 562.

The damaged competitor brought antitrust conspiracy claims against ASME, the company employing James, and the company employing Hardin. The trial court charged the jury on a ratification theory, and a verdict was returned in favor of the plaintiff. On appeal, the Second Circuit affirmed liability on a theory of apparent authority, even though the jury had not been instructed on that theory.

This Court affirmed liability under the apparent authority theory[9]. The Court cited the Restatement (Second) of Agency § 8 (1957) for its statement of the applicable theory:

> Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

Hydrolevel, 456 U.S. at 566, n.5.

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9. The concurring opinion in *Hydrolevel* regarded the majority opinion discussion of the apparent authority theory as dictum. 456 U.S. at 578.

Accordingly, the Court emphasized, under an apparent authority theory:

> "...[liability] is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person *the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him...*" (emphasis supplied)

Id., at 566.

Clearly the letter on ASME stationery which interpreted ASME's code was "regular on its face" and the persons responsible for issuing that letter appeared to a third party to be acting in the ordinary course of business confided to them. *Id.* ASME's liability was predicated upon the fact that ASME's approved procedures entrusted the interpretation of its influential codes to the persons responsible for issuing the letter, thus enabling them to conspire to utilize the "great power" of ASME to their competitive advantage. *Id.*, at 570-71.

2. *The Decision Below Contravenes And Improperly Extends The Hydrolevel Decision.* That theory of apparent authority, and its rationale, breaks down when applied to the instant case. The court of appeals, after concluding in its first opinion that it would be unreasonable for a jury to infer that NDPA's officers were acting as representatives of NDPA (App., *infra*, at A96), and that the officer's statements were nothing more than permissible complaints about 800-number dealers (*Id.*),

reversed itself and held that a reasonable jury could "infer that [NDPA officer] Petit *viewed himself*[10] as being authorized by the NDPA to make the statements he made, "and that "Petit's actions represented concerted action." *Id.*, at A33. (emphasis supplied)

The court of appeals pointed to no conduct of NDPA, the alleged principal, that could have caused a reasonable third party to believe that Petit, or anyone else, was acting in the ordinary course of business by allegedly threatening a retailer's boycott of manufacturers in violation of Section 1 of the Sherman Act. If Petit's actions are viewed as a call to boycott, rather than as expressions of dealer complaints, no reasonable third party could believe that this was a "regular transaction" that was part of his duties.[11] This is especially so in light of the overwhelming evidence, published to all NDPA members and the industry, that NDPA's policy was to comply with the Order and its antitrust policies, and the evidence that

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10. Petit's "view" of himself does not establish his authority because apparent authority flows from the conduct of the principal and not from that of the agent. *D & G Equipment v. First National Bank of Greencastle, Pa.*, 764 F.2d 950, 954 (3d Cir. 1985). Apparent authority can exist only to the extent that it is reasonable for the third party dealing with the agent to believe, from the conduct of the principal, that the agent is authorized. *Id. Bates v. Shearson Lehman Brothers, Inc.*, ___ F.3d ___ 1994 U.S. App. LEXIS 35419 (1st Cir. 1994). In the instant case, as in *D & G Equipment*, all of the actions of the principal, NDPA, were actions to deny, not to grant, authority to others with respect to the 800-number issue.

11. *Hydrolevel*, 456 U.S. at 566; *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 883 (7th Cir. 1992) ("Clearly, an essential element is the third party's reasonable belief that the agent is acting within the authority granted by the principal, that the transaction appears to be regular and in the ordinary course of business. . .").

NDPA could only act through its Board on matters of business and policy.[12]

The Court in *Hydrolevel* noted ASME's "great power" as a standard-setting association "ripe with opportunities for anticompetitive activity." *Hydrolevel*, 456 U.S. at 571. The Court concluded that a principal purpose of the antitrust private cause of action -- to deter anticompetitive practices --would be served by extending liability to standard-setting associations so that they would be encouraged to take "systematic steps" to make improper conduct on the part of their agents unlikely. *Id.*, at 572.

In contrast, NDPA is not a powerful standard-setting trade association. NDPA does not "prescribe rules for the regulation and restraint of interstate commerce," as did ASME. *Id.*, at 570. In contrast to ASME, NDPA has adopted numerous safeguards designed to make unlikely any misconduct by its agents, including adoption and dissemination of its antitrust policies and its policies about the 800-number issues which are the subject of this case. As the dissent in *Hydrolevel* points out, the majority opinion emphasized that ASME was a standard-setting organization, yet its rationale was not limited to those organizations. *Id.*, at 594. The dissent's concern that *Hydrolevel* will be read as exposing the array of nonprofit association to "a new theory of strict liability in treble damages" (*Id.*) is realized in the decision below.

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12. *Harrison v. Dean Witter Reynolds, Inc., supra*, applied *Hydrolevel* and failed to find apparent authority because of the rules of the principal which "expressly forbad" the alleged apparent agent's conduct, as do NDPA's policies and rules.

3. *The Decision Below Eviscerates The Requirement of Concerted Action In A Section 1 Case.* *Hydrolevel* stated that the antitrust cause of action should be interpreted as broadly as a plaintiff's right to sue for analogous torts "absent indications that the antitrust laws are not intended to reach so far." *Id.*, at 569. *Hydrolevel* involved at least two conspirators apart from ASME, and the Court extended antitrust conspiracy liability to ASME in that multiple conspirator context.

The court below drew the following conclusion from the *Hydrolevel* opinion:

> A principal will be liable for an antitrust violation if *an* agent acting with apparent authority violates the antitrust laws, *as one did in Hydrolevel by conspiring with another person.* App., *infra*, at A31. (emphasis supplied)

But the court of appeals then ignored the fact that NDPA has not been charged with conspiring with another person in Count I, and stated that the principal, NDPA, could be held liable as a result of the unilateral actions of its lone "agent," Robert Petit, who did not conspire "with another person" as did the agents in *Hydrolevel*. *Id.*, at A33. The difficulty in applying the rationale of *Hydrolevel* (involving multiple conspirators outside of the trade association) to Count I of this case (involving no outside conspirators) is obvious.

The decision below recognized that *Hydrolevel* "cannot be extended to defeat the 'concerted action' requirement of Section 1":

> As we explained in *Nanavati*, in the absence of a co-conspirator, an association's actions satisfy the concerted action requirement only when taken in a group capacity.

App., *infra*, at A30.

Yet the decision below finds no such concerted action by NDPA, and instead focuses on the individual actions of NDPA's alleged apparent agents. By definition, however, those alleged apparent agents cannot be authorized to act on behalf of the group, and thus the group can take no action through them. Under the apparent authority approach, the group can only appear to a reasonable third party to have acted through the apparent agents.

Appearance is not necessarily reality. NDPA took no action as a group. The decision below eviscerates the fundamental requirement of an agreement among two or more parties in a Section 1 case.

4. *Practical Consequences Favor Certiorari.* The decision below may be expected to restrict traditional trade association activities by focusing upon the conduct of a trade association's staff rather than its members. NDPA, for example, is directed by a board composed of individuals who are principally engaged as independent decorating products dealers. CA App. 1993. NDPA's staff is responsible for implementing Board directives. CA App. 2000-2001; 1982-2043. Henceforth, the "volunteer" Board members may be required to spend inordinate time and effort "policing" staff members, a prospect certain to discourage qualified candidates to take time from their

business and personal lives in order to volunteer for service as a Board member. Important and beneficial trade association activity will suffer as a result.

The *Hydrolevel* decision admittedly delineated no "outer boundaries" on a trade association's liabilities under the apparent authority theory. *456 U.S. at 577.* This case presents an important opportunity to establish those boundaries.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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